



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding RENT IT FURNISHED INC.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes

MNR, MNDC, MNSD, FF; MNDC, MNSD, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* ("Act") for:

- a monetary order for unpaid rent and for money owed or compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("Regulation") or tenancy agreement, pursuant to section 67;
- authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested, pursuant to section 38;
- authorization to recover the filing fee for this application from the tenants, pursuant to section 72.

This hearing also dealt with the tenants' cross-application pursuant to the *Act* for:

- a monetary order for money owed or compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement, pursuant to section 67;
- authorization to obtain a return of the security deposit, pursuant to section 38;
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

The landlord's agent, VS ("landlord") and the two tenants, male and female, attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The landlord confirmed that she was the property manager for the landlord company named in both applications and that she had authority to speak on its behalf at this hearing. This hearing lasted approximately 82 minutes in order to allow both parties to fully present their submissions.

Both parties confirmed receipt of the other party's application for dispute resolution hearing package. In accordance with sections 89 and 90 of the *Act*, I find that both parties were duly served with the other party's application.

I had not received the landlord's written evidence that was submitted on December 19, 2015 to the Residential Tenancy Branch ("RTB"). The tenants confirmed receipt of this written

evidence. I asked the landlord to provide me with a copy of this written evidence after the hearing, as both parties consented to this. I received the landlord's written evidence on July 20, 2016 and considered it in my decision.

Issues to be Decided

Is either party entitled to a monetary award for money owed or compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement?

Is the landlord entitled to a monetary award for unpaid rent?

Is the landlord entitled to retain the tenants' security deposit in partial satisfaction of the monetary award requested?

Are the tenants entitled to a monetary award for the return of their security deposit?

Is either party entitled to recover the filing fee for their application?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of both parties' claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on November 13, 2015 and ended on November 30, 2015. Monthly rent in the amount of \$3,795.00 was payable on the first day of each month. A security deposit of \$1,897.50 was paid by the tenants and the landlord continues to retain this deposit. Both parties signed a written tenancy agreement, which was provided for this hearing, stating that the tenancy was for a fixed term ending on March 31, 2016. The rental unit is a two-bedroom, two-bathroom, two-level townhouse. The female tenant primarily lived in the rental unit while the male tenant lived out of town.

Both parties agreed that move-in and move-out condition inspection reports were completed for this tenancy and copies were provided for this hearing. The landlord acknowledged receipt of the tenant's written forwarding address on November 30, 2015. The landlord acknowledged that the landlord did not have written permission to retain any amount from the tenants' security deposit. The landlord filed its application to retain the tenants' security deposit on December 10, 2015.

The tenants stated that they vacated the rental unit prior to the end of the fixed term, due to the landlord's breach of a material term of the tenancy agreement in failing to address a noise issue in the rental unit. The tenants explained that the landlord came and heard the noise and agreed that it was not loud but it was unpleasant. The tenants noted that the landlord offered to reduce

their monthly rent but they declined because they were unable to live in the rental unit with the sound, so a lower rent would not rectify the issue.

Both parties agreed that the tenants notified the landlord's leasing agent about a constant, low-frequency humming noise in the rental unit when the move-in condition inspection was performed on November 13, 2015. The parties agreed that the tenants sent an email to the landlord on November 14, 2015, again advising the landlord about the noise problem and asking for a solution. Neither party initially knew the cause for the noise, thinking it was a refrigerator, then an exhaust fan above the unit and finally, the central heating system. Both parties agreed that the move-in condition inspection report was then modified by the landlord on November 14, 2015 to state under the section "repairs to be completed at start of tenancy" that "repairs to the central heating system of the building to ensure that the humming noise can no longer be heard (added Nov 14, 2015)" (sic). Both parties produced numerous emails from November 2015 between the tenants and landlord regarding the noise complaints and between the landlord and strata management company regarding fixing the noise.

The tenants sent an email to the landlord on November 21, 2015, cautioning the landlord that they may serve a breach letter and that the landlord had failed to address the noise issue, causing the male tenant to fly into town in order to deal with the issue. The landlord's response on the same date was to advise the tenants that inquiries would be made regarding a fan above the unit and the tenants would be apprised but that it was within the strata management company's control. The landlord sent a person to assess the noise on November 23, 2015 and the report was that the noise was from steam rushing through the piping and control valves on the mechanical floor below. The email also said that the issue would not be brought up until the strata council meeting on December 17, 2015.

The female tenant said that she was unable to properly sleep or work because of the noise and that she developed headaches as well. She said that she moved to this country due to her employment as a doctor with a cancer agency and that her work required her to be alert and focused. The male tenant said that he worked out of country during this tenancy but he was at the rental unit during the move-in condition inspection and he had to return again mid-tenancy in order to assist the female tenant to rectify the noise issue. The male tenant agreed that he heard the sound when he was in the rental unit and it also affected him negatively. The tenants testified that the noise was unbearable, causing the rental unit to be uninhabitable. The female tenant testified that she moved to an alternate accommodation on November 22, 2015 and began paying rent at the other unit. The tenants said that they delivered a breach letter to the landlord on November 25, 2015, advising that they would be ending their tenancy effective on November 30, 2015. The tenants said that they offered a mutual agreement to end the tenancy but the landlord declined and after no resolution of the noise issue was achieved, they vacated the unit as of November 30, 2015.

The tenants seek a monetary award of \$4,569.50 total. The tenants seek a return of their security deposit of \$1,897.50. They seek rent reimbursement of \$2,277.00 for the entire

tenancy period from November 13 to 30, 2015 because they say that the rental unit was uninhabitable. The tenants seek a \$195.00 cleaning fee and a \$150.00 strata move-in fee that they paid for this tenancy.

The landlord disputes the tenants' claims. The landlord said that she was not aware of the noise issue until the move-in condition inspection on November 13, 2015. She agreed that she heard the noise and it was a constant sound. The landlord produced two emails, both dated November 25, 2015, from former tenants who used to live in the same unit who agreed that the sound was "consistent noise" and "annoying." However, the landlord said that the former tenant did not think that the noise was "debilitating." The landlord said that her phone was not sensitive enough to record the low noise in order to submit it to the strata company for consideration.

The landlord testified that the noise issue was outside of the landlord's control because it was the strata company's responsibility since the heating system is located in a common area of the rental building. The landlord said that it made reasonable efforts to contact and advise the strata company about the tenants' ongoing concerns and to keep the tenants apprised of any developments. The landlord claimed that the strata company considered the issue at a council meeting on December 17, 2015 and that on December 23, 2015, the landlord was advised that the strata company would not pursue or rectify the noise. The landlord noted that a technician's report revealed that the noise issue was too expensive to fix, as soundproofing the mechanical and storage room would have to be done.

The landlord seeks a monetary order totaling \$4,527.38, which includes the \$50.00 filing fee. The landlord said that the tenants breached the fixed term tenancy agreement and vacated early, so the landlord is entitled to a loss of rent as a result. The landlord seeks a loss of rent of \$1,591.45 for the period from December 1 to 13, 2015, when the unit could not be rented out. The landlord said that a new tenant began occupying the rental unit on December 14, 2015. The landlord noted that the new tenants have not reported any issues with the humming noise. The landlord seeks a difference in rent amount because the unit was re-rented at a lower monthly rent of \$2,995.00 per month instead of the \$3,795.00 that these tenants were paying under their fixed term tenancy agreement. The landlord said that the unit was advertised immediately on December 1, 2015, and that the monthly rent amount was reduced in consideration of the slow winter season and the difficulty re-renting during that time. The landlord seeks a difference of \$464.51 for the month of December 2015 and \$800.00 for each month from January to March 2016. The landlord also seeks to recover \$21.42 in registered mail costs associated with its application.

Analysis

Act Provisions

As per section 67 of the *Act*, when a party makes a claim for damage or loss, the burden of proof lies with the applicants to establish the claim. To prove a loss, the applicants must satisfy the following four elements on a balance of probabilities:

1. Proof that the damage or loss exists;
2. Proof that the damage or loss occurred due to the actions or neglect of the other party in violation of the *Act*, *Regulation* or tenancy agreement;
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
4. Proof that the applicants followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

Section 32 of *Act* states the following with respect to the obligations of both parties during a tenancy:

(1) A landlord must provide and maintain residential property in a state of decoration and repair that

(a) complies with the health, safety and housing standards required by law, and

(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

(2) A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.

Section 28 of the *Act* deals with the tenants' right to quiet enjoyment:

28 *A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:*

(a) reasonable privacy;

(b) freedom from unreasonable disturbance;

(c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [landlord's right to enter rental unit restricted];

(d) use of common areas for reasonable and lawful purposes, free from significant interference.

Material Breach of Tenancy Agreement and Loss of Rent

Section 45(2) of the *Act* states that tenants cannot give notice to end the tenancy before the end of the fixed term. If the tenants do, they could be liable for a loss of rent during the period when the unit cannot be re-rented.

However, section 45(3) of the *Act* states that if a landlord has breached a material term of the tenancy agreement and failed to correct it within a reasonable period after the tenants give written notice of the failure, the tenants may end a tenancy effective on a date after the date the landlord receives the notice.

I find that the tenants were entitled to end their fixed term tenancy early as there was a breach of a material term of the tenancy agreement. Both parties agreed that there was a constant, low humming sound that was clearly audible in the rental unit. The landlord heard the noise and produced an email from former tenants who heard the noise. Although the previous tenants may not have been affected in the same way by the noise, this application is about these current tenants and their needs and requirements, not the former tenants. Both parties produced emails documenting the noise and their efforts to deal with the issue.

I accept the tenants' testimony that they suffered a lack of sleep and an inability to properly work, due to this noise. I find that the tenants suffered a loss of the value of their rental unit, due to the ongoing noise. I find that the ability to live in an environment free of a constant, albeit low, humming noise, in order to function in activities of daily living such as work and sleep is a material term of the tenancy agreement that the landlord breached by failing to rectify the noise issue. I find that the tenants' right to quiet enjoyment under section 28 of the *Act* was breached by the noise, which constituted unreasonable and ongoing disturbance.

I find that the landlord failed to deal with the noise issue in a timely or efficient manner. The tenants notified the landlord about the issue on the day they moved into the unit on November 13, 2015. The landlord modified the move-in condition inspection report to indicate that the noise would be eliminated. The tenants produced numerous emails of their inquiries into the progress of the situation and only due to this continued effort, did the landlord make efforts to contact the strata management company. The landlord did not have an answer until December 23, 2015 that the noise issue would not be rectified by the strata management company.

Between the time of November 13, when the landlord was first notified about the noise issue, and November 25, when the breach letter was served to the landlord, is a lengthy and reasonable period of 12 days. During this time period, the landlord not only failed to rectify the noise issue but also failed to provide a timeline to the tenants as to how or when the issue might be dealt with. The tenants even served a warning email to the landlord on November 21 prior to serving a breach letter on November 25, that they intended to end the tenancy if the landlord failed to address the noise issue. The landlord simply advised the tenants that the issue would be raised at a strata council meeting on December 17, more than a month after it was first reported on November 13.

I find that the landlord breached section 32 of the *Act* by failing to provide a rental unit that was suitable for occupation by the tenants. Although the landlord said that the noise issue was

under the control of the strata management company, being in a common area, the landlord is still responsible to provide an adequate rental unit to the tenants as part of the tenancy agreement. The tenants have a legal contractual relationship with the landlord.

I find that the tenants are entitled to a return of 50% of their rent paid to the landlord between November 13 and 30, 2015. The tenants said that they paid rent of \$2,277.00 to the landlord during the above time period and I find that they are entitled to a return of \$1,138.50. I find that the tenants still had some use of the rental unit during the above time period and that they owe some rent for this use. Although the female tenant found alternate accommodations early on November 22, the tenants did not end their tenancy officially until November 30 when they performed the move-out condition inspection and returned the keys to the landlord.

I find that the tenants are entitled to a return of the cleaning fee of \$195.00 and the strata move-in fee of \$150.00. I find that these are costs associated with the tenancy that were only borne by the tenants because the landlord induced them into renting the unit by assuring that they would remedy the noise problem and then failed to do so.

As I have found that the landlord breached a material term of the tenancy agreement causing the tenants to breach the fixed term tenancy agreement, I find that the landlord is not entitled to any rent loss from the tenants. Accordingly, I dismiss the landlord's application for a monetary award of \$4,455.96 in rent loss.

Other Costs

As advised to the landlord during the hearing, the landlord is not entitled to recover registered mail costs of \$21.42 associated with its application. The only hearing-related costs that are recoverable under section 72 of the *Act* are for filing fees.

As the landlord was unsuccessful in its application, I find that it is not entitled to recover the \$50.00 filing fee from the tenants.

As I have found that the landlord is not entitled to any monetary award, I order the landlord to return the tenants' security deposit in the amount of \$1,897.50 to the tenants. Over the period of this tenancy, no interest is payable on the deposit.

As the tenants were mainly successful in their application, I find that they are entitled to recover the \$50.00 filing fee from the landlord.

Conclusion

I issue a monetary order in the tenants' favour in the amount of \$3,431.00 against the landlord as follows:

Item	Amount
Rent Reimbursement	\$1,138.50
Cleaning Fee	195.00
Strata Move-in Fee	150.00
Return of Security Deposit	1,897.50
Filing Fee	50.00
Total Monetary Award	\$3,431.00

The tenants are provided with a monetary order in the amount of \$3,431.00 in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

The landlord's entire application is dismissed without leave to reapply.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: July 26, 2016

Residential Tenancy Branch